Filed 6/25/19 M.D. v. Los Angeles Unified School Dist. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

M.D., Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B287485 & B289337 (Los Angeles County Super. Ct. No. BC559376)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Monica Bachner, Judge. Reversed and remanded with directions.

Pavone & Fonner and Benjamin Pavone for Plaintiff and Appellant.

Liebman, Quigley & Sheppard, Lane Quigley and Joseph R. Zamora for Defendant and Respondent.

Plaintiff and appellant M.D. (Plaintiff) appeals a judgment following the grant of a motion for judgment on the pleadings brought by defendant and respondent Los Angeles Unified School District (District or LAUSD). Plaintiff also appeals a postjudgment order denying his motion to tax costs and awarding $34,965.36 in costs to the District.

The essential issue presented is whether, as the trial court determined, the action is barred by Plaintiff's noncompliance with the Tort Claims Act. (Gov. Code, § 900 et seq., § 945.4.)[1] We conclude that Plaintiff's reliance on *E.M. v. Los Angeles Unified School Dist.* (2011) 194 Cal.App.4th 736 (*E.M.*) is unavailing because *E.M.* subsequently was disapproved by the Supreme Court in *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648 (*J.M.*), and *J.M.*'s interpretation of the statutory scheme is controlling. Therefore, if the accrual date was May 3, 2013 (the date of the incident), Plaintiff's action is barred by his noncompliance with the Tort Claims Act. However, we find that Plaintiff is entitled to leave to amend his complaint to allege an injury accrual date of February 26, 2014, when he allegedly learned that he had sustained a traumatic brain injury as a result of the May 3, 2013 incident. Therefore, we reverse both the judgment and the order awarding costs to the District, and remand for further proceedings.

OVERVIEW OF TORT CLAIMS ACT PROCEDURES AND PERTINENT CASE LAW

1. *The statutory scheme.*

Before suing a public entity, a plaintiff must present a timely written claim for damages to the entity. (§ 911.2; *Shirk v.*

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[1] All unspecified statutory references are to the Government Code.

Vista Unified School Dist. (2007) 42 Cal.4th 201, 208 (*Shirk*), superseded by statute on other grounds as stated in *A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1258.) Such a claim must be presented to the governmental entity no later than six months after the cause of action accrues. (§ 911.2; *Shirk*, *supra*, at p. 208.) The cause of action accrues for purposes of the claims statute on the same date that the statute of limitations would begin to run in a dispute between private litigants. (§ 901; *Shirk*, *supra*, 42 Cal.4th at pp. 208–209.) Timely claim presentation is not merely a procedural requirement, but rather, a condition precedent to the plaintiff's maintaining an action against a defendant, and thus, an element of the plaintiff's cause of action. (*Shirk*, *supra*, 42 Cal.4th at p. 209.) The "failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

Only after the public entity has acted upon the claim, or is deemed to have rejected the claim, may the injured person bring a lawsuit alleging a cause of action in tort against the public entity. (§ 912.4, § 945.4; *Shirk*, *supra*, 42 Cal.4th at p. 209.) Generally, the lawsuit must be commenced within six months of notice of rejection of the claim. (§§ 913, 945.6; Code Civ. Proc., § 342; *Shirk*, *supra*, 42 Cal.4th at p. 209.)

If a claim is not presented to the public entity within six months of accrual, an application may be made pursuant to section 911.4 to present a late claim. Section 911.4 provides in relevant part: "(a) When a claim that is required by Section 911.2 to be presented not later than six months after the accrual

of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim. [¶] (b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim."

The statutory scheme contains a special rule for minors, *requiring* the public entity to grant a minor's late claim application if the application is filed within one year of accrual of the cause of action. Section 911.6 states in relevant part: "(b) The board[2] shall grant the application where one or more of the following is applicable: [¶] (1) . . . [¶] (2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim."

If "an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4." (§ 946.6, subd. (a).) The petition for relief from the claim presentation requirement "shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6." (§ 946.6, subd. (b).) The court *shall* relieve the petitioner "if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable:

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[2] "Board," in the case of a local public entity, means the governing body of the local public entity. (§ 900.2, subd. (a).)

[¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4. [¶] (2) *The person who sustained the alleged injury, damage, or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim*." (§ 946.6, subd. (c), italics added.)

2. *The* E.M. *decision held that when a public entity erroneously denies a late claim application by a minor, the minor may file suit without filing a petition for relief from the claims statute.*

In *E.M.*, *supra*, 194 Cal.App.4th 736, a minor who had been sexually molested by a high school coach filed a government tort claim with the school district nine months after the last sexual contact. (*Id.* at p. 739.) The district denied the claim as untimely because it was not presented within six months of the event or occurrence. (*Ibid.*) Five months after the district rejected the late claim application, the minor filed suit against the district. (*Id.* at p. 741.) Two months after filing suit, the minor filed a petition in the superior court, pursuant to section 946.6, for relief from the claims statute. (*Id.* at p. 741.)

This court held that "[b]ecause [the] plaintiff was a minor, the [d]istrict was required to grant the application for leave to present the late claim, which application was made within one year of the accrual of the cause of action. (§ 911.6, subd. (b)(2).)" (*E.M.*, *supra*, 194 Cal.App.4th at p. 747.) Accordingly, the minor's "application for leave to present a late claim satisfied the Tort Claims Act claim presentation requirement. On September 25, 2008, the [d]istrict advised plaintiff it had rejected the

application. Plaintiff thereby satisfied the procedural prerequisite, prior to filing suit, of presenting a claim to the [d]istrict and having the claim acted upon by the [d]istrict. (§ 945.4.) [¶] *Consequently, plaintiff, having complied with the claims statutes, was entitled to file her lawsuit without bringing a petition for relief from the claims statute*. (§ 946.6.)" (*E.M.*, *supra*, 194 Cal.App.4th at p. 747, italics added.)

E.M. "reject[ed] the notion that notwithstanding a public entity's erroneous denial of a timely application for leave to present a late claim, a plaintiff must obtain judicial relief from the claims statute prior to filing a lawsuit. The purpose of the claims statute is to give the public entity timely notice of a claim and sufficient information to enable the public entity to investigate the claim and to settle it, if appropriate, without the expense of litigation. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738.) [The minor's] timely application for leave to present a late claim satisfied the technical requirements of the statutory scheme as well as the purpose of the statute." (*E.M.*, *supra*, 194 Cal.App.4th at p. 748.)

3. *Subsequent disapproval of* E.M. *by* J.M.

Six years after *E.M.* was decided, it was disapproved by *J.M.*, *supra*, 2 Cal.5th 648. In *J.M.*, a high school student who allegedly was injured in a football game presented a school district with an application to file a late claim nearly a year after the claim accrued. (*Id.* at p. 651.) The district took no action, and thus the claim was deemed denied by operation of law on December 8, 2012, on the 45th day after it was presented. (§ 911.6, subd. (c); *J.M.*, *supra*, at p. 652.) More than eight months later, counsel petitioned the superior court for relief from the obligation to present a claim before filing suit. The trial court

denied the petition, noting that it should have been filed within six months of December 8, 2012, i.e., by June 9, 2013. The Court of Appeal affirmed. It disagreed with *E.M.*, *supra*, 194 Cal.App.4th 736, under which the minor's suit would have been allowed to proceed. (*J.M.*, *supra*, 2 Cal.5th at p. 652.)

J.M. affirmed, stating that the minor's "construction would permit a plaintiff to sue a public entity without presenting either a timely claim or a timely petition for relief under section 946.6 . . . . The statutes do not permit such a procedural shortcut." (*J.M.*, *supra*, 2 Cal.5th at p. 654.)

J.M. noted that "[i]n the trial court [the minor] did not rely on *E.M.*, *supra*, 194 Cal.App.4th 736, which would have supported his position. . . . [*E.M.*] reason[ed] that the claim presentation requirement was satisfied by the plaintiff's attachment of a claim to her late claim application. (*Id.* at p. 747.)" (*J.M.*, *supra*, 2 Cal.5th at pp. 654-655.)

J.M. found: "The *E.M.* court was not persuaded that the plaintiff's only recourse was a petition for relief under section 946.6. 'The purpose of the claims statute is to give the public entity timely notice of a claim and sufficient information to enable the public entity to investigate the claim and to settle it, if appropriate, without the expense of litigation. [Citation.] Plaintiff's timely application for leave to present a late claim satisfied the technical requirements of the statutory scheme as well as the purpose of the statute.' (*E.M.*, *supra*, 194 Cal.App.4th at p. 748.)" (*J.M.*, *supra*, 2 Cal.5th at p. 655.)

J.M. held: "The *E.M.* court erred. There was no timely notice of the claim there, only an application for leave to provide *untimely* notice. The 'technical requirements' of section 946.6 were not satisfied, they were flouted. (*E.M.*, *supra*, 194

Cal.App.4th at p. 748.) As the leading treatise on the Government Claims Act observes, *E.M.* renders the provisions of section 946.6 superfluous and creates confusion over the proper procedure when a minor's late claim application is denied. (Van Alstyne et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 2017) § 7.60, p. 7-54.) The *E.M.* court's failure to give effect to section 946.6 violated a cardinal rule of statutory construction: 'An interpretation that renders related provisions nugatory must be avoided . . . .' [Citations.] We disapprove *E.M. v. Los Angeles Unified School Dist.*, *supra*, 194 Cal.App.4th 736, to the extent it is inconsistent with our opinion." (*J.M.*, *supra*, 2 Cal.5th at p. 655.)

Against this backdrop, we turn to the instant proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The incident and the presentation to the District of a late claim*.[3]

On the afternoon of May 3, 2013, Plaintiff, who was 15 years old at the time, was injured at school when he was struck on the head by a desk that had been dropped in a stairwell. He was treated for his injuries at the school.

Eleven months later, on April 8, 2014, Plaintiff presented to the District a late claim and requested that the District accept the claim pursuant to section 911.6, subdivision (b)(2) because he was a minor. The claim was deemed denied by operation of law

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[3] Inasmuch as this appeal follows the grant of a motion for judgment on the pleadings, which is the functional equivalent of a general demurrer (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452), we draw our facts from those pleaded in the complaint and those of which we may take judicial notice. (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 516, fn. 1.)

45 days later, on May 23, 2014, due to the District's failure to act on the claim. (§ 912.4, subd. (c).)

Plaintiff did not thereafter file a petition for relief from the claim filing requirements within the statutory six-month period. (§ 946.6, subd. (b).)

2. *Plaintiff's lawsuit against the District; the parties litigate the merits for two and one-half years before the District asserts Plaintiff's failure to file a petition for relief under section 946.6.*

On October 1, 2014, within six months of the date his claim was deemed denied by operation of law, Plaintiff commenced this action against the District. Plaintiff alleged a single cause of action for negligence arising out of the May 3, 2013 incident, based on the District's failure to supervise students as they carried desks and other heavy furniture, a task that should have been performed by the school's maintenance department. Plaintiff alleged that on April 8, 2014, he presented a claim to the District for the injuries that he suffered in the incident, and that the claim was deemed rejected at the expiration of the 45-day period.

On January 20, 2015, Plaintiff filed the operative first amended complaint, which alleged separate causes of action for negligence and negligent supervision.

The District's answer to the first amended complaint pled as its third affirmative defense that "any alleged cause of action is barred by the plaintiff's failure to timely comply with applicable claim statute requirements, including without limitation, Government Code sections 901, 911.2, 911.4, 945.4 and 945.6 and all related code sections." However, the District did not actually pursue an affirmative defense of noncompliance

with the claims statute until after *J.M.* was decided in March 2017.

Meanwhile, the parties intensively litigated the matter. In June 2016, with trial due to commence in two months, the parties entered into a stipulation to continue the trial. The stipulation indicated: Plaintiff alleged that he suffered significant head trauma and resulting neurological problems. The District "asserted a number of defenses, primarily contending that there is no evidence the incident actually happened (or happened on LAUSD's premises), [and] even if it did, it is not necessarily negligence by the school if students engaged in unauthorized or reckless behavior, and LAUSD challenge[d] the extent of Plaintiff's claimed injuries."

The stipulation further stated that: The parties were engaged in discovery. Plaintiff had completed the depositions of relevant authority figures at the school, and had been working through a list of 600 potential witnesses to corroborate that the incident occurred. The District had deposed Plaintiff and his mother and had set percipient witness depositions for July 2016. The District also planned "to assess [Plaintiff's] cognitive function per several IME requests" and the parties were engaged in the meet-and-confer process to try and reach agreement on the scope of a neurologic examination without the need for judicial intervention. Further, both parties expected to call doctors, school officials, and medical experts to support their respective cases, and it would be futile "to try a case in the middle of many witnesses' summer vacation."

The court continued the trial date to April 24, 2017, with the final status conference scheduled for April 18, 2017.

3. *Following the issuance of the* J.M. *decision, the District moves for judgment on the pleadings.*

On March 6, 2017, the Supreme Court issued its decision in *J.M.*, *supra*, 2 Cal.5th 648, disapproving this court's 2011 decision in *E.M.*, *supra*, 194 Cal.App.4th 736.

On April 11, 2017, the District filed a motion in limine (MIL) to preclude any evidence regarding Plaintiff's damages due to his failure to comply with the claim filing requirements of the Tort Claims Act. The District argued that "[u]nder the recent California Supreme Court case of *J.M.* . . . , [P]laintiff was required to file a Petition with the Superior Court to be relieved of the claims filing statutes once his 'late claim' was deemed denied. . . . Given the recent Supreme Court holding in [*J.M.*] . . . , [P]laintiff's failure to petition the Court for permission to be relieved of the claims filing requirements is fatal to this litigation."

On April 18, 2017, the District filed an ex parte application to specially set a hearing date on a motion for judgment on the pleadings, or for an order shortening time for the service and filing of such a motion. The District argued that good cause existed because "the grounds for defendant LAUSD's motion *have only recently become available* based on the California Supreme Court's decision in *J.M.* . . . (filed March 6, 2017), wherein the California Supreme Court reaffirmed that a plaintiff (claimant) must comply with the mandatory provisions of Government Code section 946.6 [petition for relief] once an application for leave to present [a] late claim . . . has been 'deemed denied' by the public entity." (Italics added.) The trial court denied the ex parte application, directed the District to "file the Motion with

standard notice," and continued the trial date to January 2018 due to the state of the court's docket.

On April 26, 2017, the District filed the motion for judgment on the pleadings that is the focus of this appeal. The District argued it was entitled to judgment as a matter of law pursuant to *J.M.*, *supra*, 2 Cal.5th 648, because Plaintiff failed to file a petition to be relieved of the claims filing requirements after his application for leave to present a late claim was deemed denied.

In opposition, Plaintiff argued the motion for judgment on the pleadings should be denied because he justifiably relied on *E.M.*, *supra*, 194 Cal.App.4th 736, which was the controlling authority at the time of the incident. Pursuant to *E.M.*, as a minor he was entitled to file a late claim and then to file suit, without first filing a petition for relief under section 946.6.

Plaintiff also argued, in the alternative, that the accrual date of his injury was February 26, 2014, "when he blacked out in class," making his April 8, 2014 claim timely, and therefore rendering a petition for relief under section 946.6 unncecessary. Plaintiff asserted that although he was hit in the head by a desk on Friday, May 3, 2013, he merely suffered headaches, vomited and felt dizzy that weekend, a CT scan the following Wednesday (May 8, 2013) was normal, his doctor sent him home with advice to take ibuprofen, and his headaches and dizziness quickly subsided. Plaintiff contended he was entitled to show that he did not suspect that he suffered an actual and appreciable injury until February 26, 2014, when he suffered a blackout and learned that he had sustained a traumatic brain injury.

After hearing the matter, the trial court granted the District's motion for judgment on the pleadings, concluding that *J.M.* must be given retroactive effect because it did not establish a new rule of law, but merely gave effect to the claims statutes that *E.M.* had misconstrued. Pursuant to section 946.6, Plaintiff was required to have filed a petition for relief from the claims statute within six months of May 23, 2014, when his late claim application was deemed denied by operation of law. Because Plaintiff did not file such a petition, the District was entitled to judgment on the pleadings.

With respect to Plaintiff's alternative argument that his April 8, 2014 claim was timely because the accrual date was February 26, 2014, the trial court ruled that "Plaintiff's argument is based on facts that are outside of the first amended complaint and/or judicially noticed documents."

On November 9, 2017, the trial court entered judgment on the pleadings. On January 8, 2018, Plaintiff filed a timely notice of appeal from the judgment.

On February 21, 2018, after denying a motion by Plaintiff to tax costs, the trial court awarded costs to the District in the amount of $34,965.36, consisting of $10,358.71 in non-expert expenses, and $24,606.65 in expert fees incurred after the date of District's offer to compromise, which was not accepted. (Code Civ. Proc., § 998.) On April 9, 2018, Plaintiff filed a timely notice of appeal from the postjudgment order.[4]

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[4] This court consolidated the two appeals for purposes of oral argument and decision.

CONTENTIONS

Plaintiff contends the trial court erred in granting judgment on the pleadings because the Supreme Court's 2017 decision in *J.M.* should not be applied retroactively to bar his action. Alternatively, Plaintiff argues the accrual date of his traumatic brain injury was February 26, 2014, when he suffered a blackout in class, and therefore the claim that he presented to the District on April 8, 2014 was timely. Plaintiff also contends that because he properly relied on this court's decision in *E.M.*, the trial court erred in awarding costs to the District.

DISCUSSION

1. *Standard of appellate review.*

Because a motion for judgment on the pleadings is the functional equivalent of a general demurrer, the same rules apply. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 900.) " 'We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. [Citation.] Because a demurrer tests only the legal sufficiency of the pleading, the facts alleged in the pleading are deemed to be true. [Citation.] We do not review the validity of the trial court's reasoning, and therefore will affirm its ruling if it was correct on any theory.' [Citation.]" (*Ibid.*)

With respect to leave to amend, a failure to request leave to amend in the lower court does not bar a plaintiff from making such a request on appeal. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861.) If a demurrer was sustained without leave to amend, we must decide whether there is a reasonable possibility the plaintiff is capable of amending the pleading to cure the defect. (*Schifando v. City of Los Angeles*

(2003) 31 Cal.4th 1074, 1081.) The burden of proving such reasonable possibility rests with the plaintiff. (*Ibid*.)

2. J.M. *did not declare a new rule of law, but merely gave effect to the statutory scheme that* E.M. *had misconstrued, and therefore* J.M. *applies to the instant case as a matter of stare decisis; pursuant to* J.M., *the trial court properly held the first amended complaint, which alleged an accrual date of May 3, 2013, is barred by Plaintiff's failure to comply with the claims statute.*

In *J.M.*, *supra*, 2 Cal.5th 648, the Supreme Court did not discuss whether its disapproval of *E.M.* should be given retroactive effect. Therefore, we are required to address the issue. We begin with the general rule that decisions of the Supreme Court are given retroactive effect. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978.)

To determine "whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive, . . . ; *but if it does not, 'no question of retroactivity arises,' because there is no material change in the law*. [Citations.] In that event the decision simply becomes part of the body of case law of this state, and under ordinary principles of stare decisis applies in all cases not yet final." (*People v. Guerra* (1984) 37 Cal.3d 385, 399, italics added; accord, *In re Borlik* (2011) 194 Cal.App.4th 30, 40.)

As pertinent here, a new rule of law is not established when the California Supreme Court merely gives "effect to a statutory rule that the courts had theretofore misconstrued[.]" (*People v. Guerra*, *supra*, 37 Cal.3d at p. 399, fn. 13.) Prior "misconstruction of a statute by the courts does not prevent the

retroactive application of the Supreme Court's authoritative interpretation. [Citations.]" (*McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 982.)

Here, the *J.M.* decision did not establish a new rule of law. Rather, *J.M.* merely gave effect to a statutory procedural requirement that had been misconstrued by *E.M.* The Supreme Court in *J.M.* unequivocally stated that "[t]he *E.M.* court erred. There was no timely notice of the claim there, only an application for leave to provide *untimely* notice. *The 'technical requirements' of section 946.6 were not satisfied, they were flouted*. (*E.M.*, *supra*, 194 Cal.App.4th at p. 748.) . . . . The *E.M.* court's failure to give effect to section 946.6 violated a cardinal rule of statutory construction: 'An interpretation that renders related provisions nugatory must be avoided . . . .' [Citations.] We disapprove *E.M. v. Los Angeles Unified School Dist*., *supra*, 194 Cal.App.4th 736, to the extent it is inconsistent with our opinion." (*J.M.*, *supra*, 2 Cal.5th at p. 655, italics added.)

Because *J.M.* did not establish a new rule of law but merely gave effect to a statutory requirement that previously had been misconstrued by *E.M.*, there is no issue as to retroactivity. The *J.M.* decision "simply bec[ame] part of the body of [California] case law" (*People v. Guerra*, *supra*, 37 Cal.3d at p. 399), and therefore *J.M.* applies to Plaintiff's lawsuit as a matter of stare decisis. (*Ibid*.) Thus, following the denial of a late claim application, a minor, like any other claimant, is required to file a timely petition for relief from the claims statute (§ 946.6) before filing suit. (*J.M.*, *supra*, 2 Cal.5th at pp. 653-654.)

Here, Plaintiff's first amended complaint alleged that the cause of action accrued on May 3, 2013, when Plaintiff was struck by the falling desk; that Plaintiff submitted a late claim

application on April 8, 2014; and the claim was deemed denied 45 days later. The pleading lacks an allegation that Plaintiff complied with the claims statute by bringing a petition for relief from the claims statute before filing suit. (§§ 945.4, 946.6; *Shirk*, *supra*, 42 Cal.4th at p. 209.) Therefore, insofar as Plaintiff's lawsuit is predicated on a cause of action that accrued on May 3, 2013, the trial court properly determined that the action is barred by Plaintiff's noncompliance with the claims statute.

3. *Plaintiff has demonstrated on appeal a reasonable possibility that he can amend his complaint to allege an accrual date of February 26, 2014.*

A plaintiff may make a showing that he can amend his complaint for the first time on appeal. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.) To satisfy that burden on appeal, a plaintiff must show "in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) In considering whether there is a reasonable probability a defect in the complaint could be cured by amendment, a court may consider counsel's statements at oral argument. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 870; *Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 867.)

Plaintiff's counsel stated at oral argument that, if given an opportunity to do so, he could allege an accrual date of February 26, 2014, which is when Plaintiff "blacked out in class."[5] Plaintiff emphasizes it was not until February 26, 2014, when he suffered

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[5] If the cause of action accrued on February 26, 2014, the claim that Plaintiff presented to the District on April 8, 2014 would have been timely.

the blackout, that he became aware of his traumatic brain injury, as the CT scan that was performed shortly after the incident appeared to be normal.

Pooshs v. Philip Morris USA, Inc. (2011) 51 Cal.4th 788 (*Pooshs*), is instructive. There, the plaintiff was a cigarette smoker for 35 years, from 1953 through 1987. In 1989, she was diagnosed with chronic obstructive pulmonary disease (COPD), which she knew was caused by her smoking habit. Nevertheless, she did not sue the manufacturers of the cigarettes that she had smoked, and the statutory period for doing so elapsed. In 1990 or 1991, she was diagnosed with periodontal disease, which she knew was caused by her smoking habit. Again, she did not sue the various cigarette manufacturers, and the statutory period for doing so elapsed. In 2003, plaintiff was diagnosed with lung cancer. This time, she sued. The issue presented was whether her lawsuit, based on that later-discovered latent disease, was time-barred. (*Id.* at p. 791.)

Pooshs concluded that when a later-discovered latent disease is separate and distinct from an earlier-discovered disease, the earlier disease does not trigger the statute of limitations for a lawsuit based on the later disease. (*Pooshs*, *supra*, 51 Cal.4th at p. 803.) *Pooshs* explained: "[N]o good reason appears to require plaintiff, who years ago suffered a smoking-related disease that is *not* lung cancer, to sue *at that time* for lung cancer damages based on the speculative possibility that lung cancer might later arise. . . . [¶] It is true that here plaintiff's COPD involved the same part of the body (the lungs) as her lung cancer. Nevertheless, . . . in deciding the statute of limitations issue we accept as true plaintiff's factual assertion 'that COPD is a separate illness, which does not pre-dispose or lead to lung

cancer and that it has nothing medically, biologically, or pathologically to do with lung cancer.' [Citation.] Assuming that assertion to be true, it does not matter that both diseases affect the lungs. The significant point is that the later-occurring disease (lung cancer) is, according to plaintiff's offer of proof, a disease that is separate and distinct from the earlier-occurring disease (COPD). Therefore, . . . the statute of limitations bar can apply to one disease without applying to the other." (*Pooshs*, *supra*, 51 Cal.4th at p. 802.)

Thus, claims arising from separate injuries caused by the same wrongdoing may accrue on different dates, based upon when plaintiff discovered each injury. In the instant case, we cannot say as a matter of law that the traumatic brain injury that allegedly manifested on February 26, 2014 (i.e., blackouts, seizures and other complications) was not separate and distinct from the head injury that manifested on May 3, 2013 (i.e., headache, vomiting, dizziness). While we express no opinion as to Plaintiff's ability to plead a cause of action based upon an accrual date of February 26, 2014, Plaintiff is entitled to the opportunity to attempt to do so. Accordingly, we reverse the trial court's order granting judgment on the pleadings and remand the matter to enable Plaintiff to file a second amended complaint.

4. *The trial court's award of costs to the District must be reversed.*

As indicated, after granting judgment on the pleadings, the trial court awarded $34,965.36 in costs to the District as the prevailing party in the action. In light of our conclusion that the judgment on the pleadings must be reversed, there is no prevailing party at this juncture, making the issue of costs premature. Therefore, the award of costs to the District must

also be reversed. (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1437, fn. 75.)

DISPOSITION

The judgment on the pleadings is reversed with directions to grant Plaintiff leave to file a second amended complaint. The postjudgment order awarding costs to the District is also reversed. Plaintiff shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.